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Dividing Up Assets After Death

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Dividing Up Assets After Death

-by Neil E. Harl*

Dividing assets after death rarely poses a problem although there may be hurt feelings for years among those getting less than a proportionate share of the estate. The problems, if they develop in dividing up assets after death, usually arise where the parents left undivided interests in assets, particularly if the assets are of unequal value and an equal division is difficult or impossible to achieve. That could occur with one-of-a-kind personal property items or of farmland with widely varying productivity and value. Unfortunately, none of the alternatives will assure that all parties will be completely satisfied. However, some of the options score higher than others. With careful pre-death planning and full disclosure as to why the division of assets is planned, the level of satisfaction can be elevated significantly.

Undivided interests passing to the heirs

The first issue is whether the heirs are willing to continue for the foreseeable future as happy, cheerful and contented holders of undivided interests in the assets, including the farm or ranch land involved. If so, the major concern is in deciding who will bear responsibility for management, how the ownership will be handled long-term (as undivided interests or as co-owners of an entity formed prior to or after death such as a limited liability company – LLC, limited liability partnership or some other organizational structure) and how those concerns should be carefully worked out and agreed to in writing in a manner that will be enforceable even on the part of a minority owner.

A mere partition of the assets (if that is possible) may be acceptable if the assets in question can be fairly divided. However, few tracts of land have sufficient uniformity of value to permit a partition without some adjustments made in the division of assets. One very important point — a partition of assets by heirs after death can avoid recognition of gain unless a debt security (such as a promissory note), a commitment to share the crops and other output unequally for a stated period in favor of the recipient or recipients of the less valuable land or some other form of “boot” is paid and received or property received that differs “. . . materially. . . in kind or extent. . .” from the those getting less productive land.¹

This option works best where all of the heirs are off-farm heirs.

Property is left in trust and the trustee has the authority to allocate the assets

One of the less well understood options is for the property to be placed in trust and the trustee given specific authority to allocate the assets between or among the heirs. In a 2003

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private letter ruling,² the decedent's will was revealed and stated that, at the time of termination of the trust, the trustees were to partition (or have the properties judicially partitioned) between and among the heirs. The plan of termination allowed for the beneficiaries to request the type of assets that would be distributed to them at the time of termination of the trust with the distributions made on a *pro rata* basis. In that particular situation, a state statute made it clear that distributions did not have to be *pro rata*. In that state, distributions with statutory provisions were applicable to trusts with a *situs* in the state.

An earlier IRS ruling³ had taken the position that if neither the trust instrument nor local law authorizes the trustee to make *non-pro rata* distributions of property in kind, the distribution is treated as a sale or exchange even though there is a mutual agreement between or among the beneficiaries as to the plan of distribution. A 1981 ruling added a warning that where a federal statute specifies that gain must be recognized, that takes the matter out of the realm of state law and gain (or loss) must be recognized.⁴

What this adds up to is this – unless the federal statute in question specifically requires recognition of gain or loss, if there is a state law provision permitting *non-pro rata* distribution, exercise of that authority does not result in the recognition of gain or loss to the beneficiaries.⁵

Specific bequests

Another alternative is for the parents simply to make the decisions on who is to receive which property after the deaths of the parents and specify that outcome in the will or trust. That usually avoids the tax aspects of the division of the property after death but it may result in criticism of the parents' decisions. That aspect often weighs heavily on the parents to the point that they end up preferring for someone else to make those decisions.

END NOTES

¹ See Harl, "More on Related-Party Like Kind Exchanges," 20 *Agric. L. Dig.* 129 (2009); Harl, "Partition and the Related Party Rule," 13 *Agric. L. Dig.* 145 (2002); Harl, "Income Tax Consequences on Partition and Sale of Land," 11 *Agric. L. Dig.* 113 (2000).

² See Ltr. Rul. 200334030, May 19, 2003.

³ Rev. Rul. 1969-486, 1969-2 C.B. 159.

⁴ Rev. Rul. 83-61, 1983-1 C.B. 78 (that provision involved interpretation of tax-free or nearly tax-free corporate liquidation which was repealed in 1986).

⁵ Rev. Rul. 1983-61, 1983-1 C.B. 78; Ltr. Rul. 200334030, May 19, 2003.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

ANIMAL ABUSE. The decedent was arrested and charged with 39 accounts of animal abuse in February 2014 and the decedent's cattle were seized and placed in the care of the county. The decedent died before a criminal case could be brought against the decedent. At the death of the decedent, the charges were dismissed. The county had incurred costs for the maintenance of the cattle and filed a claim against the decedent's estate for recovery of those costs. The county argued that, under the doctrine of unjust enrichment, it is entitled to recover the costs of maintaining the decedent's animals. The elements of unjust enrichment are: (1) another party was enriched; (2) at the plaintiff's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. Thus, the court reasoned that, if the decedent had been convicted of animal abuse, it would be against equity and good conscience not to allow the county to recover the costs. However, New York Agriculture and Markets Law § 373(6) (c) provides, in relevant part: "The person who posted the security [for seized animals] shall be entitled to a full refund of security, including reimbursement by the impounding organization of any amount allowed by the court to be expended, and the return of the animal seized and impounded upon acquittal or dismissal of the

charges, except where the dismissal is based upon an adjournment in contemplation of dismissal . . ." The court held that, because the criminal charges were dismissed, the statute provided that the decedent's estate was not liable for any costs of the seizure and maintenance of the cattle because the estate would be entitled to a refund if the decedent had been required to pay any security for such costs. **Matter of Clinton County, 2017 N.Y. Misc. LEXIS 2574 (N.Y. Sur. Ct. 2017).**

BANKRUPTCY

FEDERAL TAX

DISCHARGE. The debtor and spouse had owned and operated a series of fraudulent vacation clubs where the debtor received dues but failed to provide the vacation benefits promised. The debtor pled guilty to a charge of theft by deception during 2009-2011. The debtor filed erroneous tax returns in 2009 and 2010, omitting much of the income received from the fraudulent operations. In 2015, the debtor filed for Chapter 7 and sought to discharge the unpaid taxes assessed for 2009 and 2010. The IRS argued that the taxes were nondischargeable under Section 523(a)(1)(C) for failure to report all income in 2009 and 2010. The debtor argued that the taxes were dischargeable because the debtor had no intent to file a fraudulent